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FILED
MAR 2 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 633

IN THE MATTER OF

OLE A. JENSEN,

DEBTOR.

OLE A. JENSEN,

Petitioner,

vs.

PEOPLES FINANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Ole A. Jensen, prays that the Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of said Court entered in the above entitled case on November 4, 1952 (R. 53). A petition for rehearing was denied on December 24, 1952 (R. 54). A transcript of the record in the case is furnished herewith in compliance with Rule 38 of the Rules of this Court.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit, which Petitioner seeks to have reviewed, was entered on November 4, 1952, and rehearing was denied on December 24, 1952 (R. 53 and 54). The jurisdiction of this Court arises under the United States Code, Title 11, Chapter IV, Section 47c, and Title 11, Chapter XI, Section 711, commonly set forth as Sections 24c and 311 of the Bankruptcy Act.

STATEMENT OF FACTS.

The Referee in Bankruptcy entered an order confirming an arrangement under Chapter XI of the Bankruptcy Act presented by Debtor providing for payment of debts in full out of future earnings, which plan was approved by the majority in number and amount of creditors. Peoples Finance Co., the sole objecting creditor, filed a petition for review which was denied by the District Court. Upon appeal by said creditor, the United States Court of Appeals for the Seventh Circuit, by majority decision, reversed both the order of the District Court and the order of the Referee in Bankruptcy. A dissenting opinion was written by Judge Lindley (R. 49-52).

The arrangement which was confirmed by the referee provided among other things:

1. That the Elgin, Joliet and Eastern Railway, for whom debtor (who earns over $5,000.00 per year), had worked for over twenty (20) years, deduct $35.00 from each pay check of the debtor and turn such money over to a disbursing agent appointed by the Court, and
2. That the disbursing agent pay said money periodically to the creditors of debtor until said creditors were paid in full (100%).

The arrangement included other provisions which are not in issue in this appeal. A majority in number and amount of the creditors accepted the arrangement. The Peoples Finance Company, which a claim of $342.52, was the only creditor which objected to the arrangement.

The Referee determined that debtor, as a natural person, came within the purview of Chapter XI, and that it was permissible for him to file a plan of arrangement under that Chapter for an estate out of his future earnings. The Referee likewise determined that the plan of arrangement should be confirmed, notwithstanding a previous discharge in bankruptcy by debtor within a six year period.

The Referee confirmed the plan of arrangement under Chapter XI, with the provision that the order of confirmation or any amendments thereafter entered would not constitute a discharge of the scheduled liabilities of the debtor until a showing had been made to the Court that all the terms of the plan of arrangement or order of confirmation had been complied with, and reserved jurisdiction in the Court to modify, alter, rescind, or amend the order at any time. (R. 18)

Regular payments have been made to the disbursing agent out of debtor's earnings, and a sizeable fund has been established. Although no payments have been made to debtor's creditors due to the pending appeal, the prospects of payment in full of the Finance Company's claim as well as all other claims appear to be excellent.

The majority of the judges of the United States Court of Appeals agreed with two of the contentions of the objecting creditor as follows: (R. 48)

1. that a bankruptcy court has no authority to confirm a Chapter XI arrangement providing for an estate to be created solely out of future earnings of debtor; and

2. that the previous discharge of debtor in a voluntary bankruptcy proceeding within six years of filing his petition in the District Court is a bar to the Chapter XI proceedings (R. 45-49).

It is with reference to this portion of the opinion of the Circuit Court of Appeals that debtor is petitioning for Writ of Certiorari herein, and for an order affirming the dissenting opinion of Circuit Judge Lindley (R. 49-52).

THE QUESTIONS OF LAW PRESENTED.

1. Whether the application of future wages to a liquidation of debts may be proposed as the basis of an arrangement under Chapter XI of the Bankruptcy Act.
2. Whether the statutory limitation that wage earners may take advantage of Chapter XIII of the Bankruptcy Act only if they earn less than $5,000.00 per year forecloses all persons who earn in excess of $5,000.00 per year as wages or salaries from qualifying under Chapter XI of the Bankruptcy Act.
3. Whether previous discharge in bankruptcy within six years bars debtor from obtaining in Chapter XI proceedings confirmation of an extension arrangement providing for payment of his debts in full.
4. Whether a sole dissenting creditor may on appeal question the *jurisdiction* of the lower court to enter an order confirming an arrangement under Chapter XI of the Bankruptcy Act.

SPECIFICATIONS OF ERROR.

The Court below erred in its majority opinion:

1. In applying to the facts herein mere *dicta* from cases wherein the factual situations were completely dissimilar, and in disregarding unambiguous language of the Bankruptcy Act in arriving at its decision in this case.

2. In completely disregarding and even omitting from its opinion the pertinent specific exception set forth by Congress in Section 371 of the Bankruptcy Act, thus nullifying the intent of Congress.

3. In deciding, contrary to the intent of Congress specifically set forth in the statute, that various sections of Chapter XIII proceedings shall apply to Chapter XI proceedings.

4. In disregarding the distinction between compositions and extensions, in considering arrangements under Chapter XI.

5. In permitting one sole dissenting creditor to attack, on appeal, the jurisdiction of the Court to order confirmation of an arrangement under Chapter XI of the Bankruptcy Act.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

1. The decision of the Court of Appeals is in conflict with express provisions of Chapter XI of the Bankruptcy Act, and the *dicta* of the Supreme Court of the United States.

2. The important question of jurisdiction of the Federal Courts insofar as it relates to the type of *person* entitled to relief under Chapter XI of the Bankruptcy Act requires clarification and should be settled by this Court, especially since this Court has not previously rendered a decision on this point.

3. The important question of jurisdiction of the Federal Courts, insofar as it relates to the type of *arrangement* which may be proposed under Chapter XI of the Bankruptcy Act, requires clarification and should be settled by this Court especially since this Court has not previously rendered a decision on this point.

4. The important question of the effect of previous discharge in bankruptcy upon arrangements which provide only for extension of debts under Chapter XI of the Bankruptcy Act, requires clarification and should be settled by this Court especially since this Court has not previously rendered a decision on this point.

5. The question as to whether one dissenting creditor may on appeal attack the jurisdiction of the Court to order confirmation of an arrangement under Chapter XI, should be settled by this Court.

CONCLUSION.

There are many millions of persons in the United States whose primary assets are salaries or wages which are in excess of $5,000.00 per year. Be he a judge, a banker, a lawyer, or a laborer (and many laborers in Chicago earn over $5,000.00 per year), he may become so situated that his only assets are the income which he receives as a result of his endeavors. These people constitute our so-called middle class, and they are the economic backbone of the nation. They may, because of family illness or otherwise, and resultant involvement with small loan companies and exorbitant rates of interest, become debtors who would not require or wish bankruptcy, but would require assistance of the courts to obtain extensions of payment of their obligations. It is possible that if this country of ours were ever again to suffer an economic depression, a relatively high percentage of these millions would ask the Federal Courts for aid under Chapter XI, rather than as in the last depression become suicides or bankrupts, and further contribute to the lack of economic stability of the nation.

Since the possibility of rehabilitation of these persons through Chapter XI would be eliminated or drastically reduced upon the denial of this petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and since the opinion and decision of the Supreme Court of the United States will constitute a guide post for other courts in factually similar circumstances, petitioner respectfully requests the opportunity to review before this Court certain principles of law, which petitioner believes to have been entirely misconstrued or overlooked in the majority opinion of the United States Court of Appeals for the Seventh Circuit, and in their decision heretofore rendered.

Decisions of this Court have established that in a variety of circumstances similar to those presented in the instant case a citizen will be granted relief where the Court below so departed from the general opinion of this Court as expressed in *dicta* and opinions, as to call for the exercise of this Court's supervision. The Act of Congress invoked by the debtor must be liberally construed to give the debtor the full measure of relief afforded by Congress, "lest its benefits be frittered away by narrow formalistic interpretations, which disregard the spirit, and the letter of the Act." *Wright* v. *Union Central Life Insurance Co.*, 311 U. S. 273, 279, 61 S. Ct. 196, 200. See also, *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Kalb* v. *Feuerstein*, 308 U. S. 433, 60 S. Ct. 343; *Chapman* v. *Federal Land Bank of Louisville, Ky.*, 6 Cir., 117 F. 2d 321, 325.

The majority decision of the United States Court of Appeals for the Seventh Circuit requires that a debtor under Chapter XI of the Bankruptcy Act have property *in esse* before he can have confirmation of an extension plan. There was no such requirement provided by Congress.

The decision requires that an arrangement under Chapter XI be substantially different from one under Chapter XIII. Congress did not specify what the arrangement should be or should not be.

The majority decision makes an order of confirmation automatically operate as a discharge. This completely negates the statement by Congress that the order of confirmation would not operate as a discharge if so specified in such order.

The majority decision encourages a single creditor to upset arrangements under Chapter XI which may be ap-

proved by all other creditors. The intent of Congress was that the majority in number and amount should prevail when a feasible arrangement was presented by a debtor.

Under the majority opinion as rendered by the United States Court of Appeals, the privilege of recourse to equity and to the courts for relief from creditors by way of extension of payment of obligations, will be accorded to businesses, business men, and corporations and will be withheld from those private citizens who work for a salary or for wages, and who constitute the bulk of the people in our country. Petitioner does not believe that Congress so intended such partiality to exist.

The discretionary power of this Court is invoked upon the ground that this is a matter of first impression, never decided by this Court, and that the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the express language of the Bankruptcy Act and applicable decisions of this Court in similar matters.

Wherefore, your petitioner respectfully prays that the Writ of Certiorari be issued under the Seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, or in the alternative, that this Court upon this petition reverse the judgment of the United States Court of Appeals for the Seventh Circuit and affirm the dissenting opinion of the Court of Appeals and the orders of the District Court and the referee.

Respectfully submitted,

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IN THE MATTER OF

OLE A. JENSEN,

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported, but is set forth in the transcript of this case (R. 45-52).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit, which petitioner seeks to have reviewed, was entered on November 4, 1952, and rehearing was denied on December 24, 1952 (R. 53 & 54). The jurisdiction of this Court arises under the United States Code, Title 11, Chapter IV, Section 47c, and Title 11, Chapter XI, Section 711, commonly set forth as Sections 24c and 311 of the Bankruptcy Act.

The questions of law presented in this cause are stated in the preceding petition (page 4 hereof); the statement of the case is stated in the preceding petition (pages 2-4, hereof), and the specification of error has been presented in the preceding petition (page 5 hereof). They are hereby adopted and made part of this Brief, with the permission of the Court.

ARGUMENT.

I.

A plan of arrangement to be confirmed by the Court under Chapter XI Proceedings may provide for an estate to be created out of future earnings of the debtor.

A. There are no statutory limitations as to the provisions of the arrangement in this case.

We respectfully submit that there are three sections of Chapter XI of the Bankruptcy Act which would govern the type of arrangement to be confirmed in Chapter XI proceedings:

1. Section 306 of Article II of Chapter XI states under paragraph 1:

> "'Arrangement' shall mean any plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts, *upon any terms.*" (Italics ours.)

Actually the context of Chapter XI, Article II, Sect. 306 (1) above quoted constitutes full support of the arrangement in this cause and its confirmation by the Referee. "*Upon any terms*" (italics ours) would indicate that there is no limitation concerning the terms of an arrangement when approved by the majority in number and amount of creditors.

2. Section 356 of Article VII of Chapter XI sets forth the only *mandatory* requirement for the arrangement, as follows:

> "Any arrangement within the meaning of this chapter *shall* include provisions modifying or altering the rights of unsecured creditors generally or of

some class of them, *upon any terms or for any consideration.*" (Italics ours.)

This section would also indicate a lack of limitation as to the provisions of the arrangement.

3. Section 357 of Article VII, Chapter XI of the Bankruptcy Act which is the *permissive* Section of the Act, provides:

> "Any arrangement within the meaning of this chapter *may* include * * * (3) provisions for specific undertakings of the debtor during any period of extention provided for by the arrangement, *including provisions for payments on account.*" (Italics ours.)

We respectfully submit that Section 357 of Chapter XI of the Bankruptcy Act contains no ambiguity and authorizes debtor's arrangement for payments on account until all creditors are paid in full.

There are no other pertinent requirements for arrangements set forth by Congress.

B. Nowhere in the above governing statutes is there any requirement that the arrangement contemplate "property" *in esse.*

Petitioner cannot understand the propriety of that portion of the decision of the Court of Appeals which states (R. 48):

> "The Finance Company insists that future earnings are not, in contemplation of the Bankruptcy Act, property, and the authorities seem to be in accord."

The Court cites (R. 48) in support of said statement, the cases of *Local Loan* v. *Hunt,* 292 U. S. 243, *McKeever* v. *Local Finance Co., et al.,* 5 Cir., 80 F. 2d 447, 452, and *Wood* v. *Scott,* 6 Cir., 180 F. 2d 252, 253.

The fact that characterization of "property" as being a necessary part of an arrangement is irrelevant in Chap-

ter XI proceedings, serves to make irrelevant the cases cited by the Court. However, as stated by Circuit Judge Lindley in his dissenting opinion (R. 50), these cases refer only to authorization of a court of bankruptcy to take over future earnings of a bankrupt without his consent and over his objection, and could not conceivably be applicable to this case, where the debtor voluntarily submitted his future income to the Court.

1. This Court will recall that the case of *Local Loan* v. *Hunt*, 292 U. S. 243, was squarely upon the question of certain rights of creditors after adjudication in bankruptcy. It did not concern itself with Chapter XI or with an extension arrangement, and certainly not with an offer to pay the creditors 100% of the amounts due. It was a case of the creditor saying "I want something" and the bankrupt saying "I object". Here we have the debtor saying "I will give this to you" and one creditor saying "I object".

2. The Court cites *McKeever* v. *Local Fin. Co.*, 80 Fed. 2d 449, which is not actually pertinent to this case, inasmuch as future wages are generally property subject to assignment under the Illinois Statutes, and are not property and are incapable of assignment under Section 9232 Code of Alabama, 1923, in which state the cited case was filed. However, despite the inapplicability of the *McKeever* case so far as the question of property is concerned, the Court will please note that in said case, quoted as 80 Fed. 2nd 449, in the marginal note at the bottom of page 450 the following statement appears:

> "1. Finding of fact VI. The bankrupt out of future earnings has the ability to continue to carry forward the provisions and terms of the extension agreement * * *."

3. Again as to future earnings, the Court cites the case of *Wood* v. *Scott,* 180 Fed. 2nd at 253. This citation is misleading because in that case future income was actually included, among other things, in a plan which was confirmed. However, there was a subsequent adjudication of involuntary bankruptcy under Section 377, and the Court upon entering the order of adjudication in that case, declared the arrangement to be abandoned, void and of no effect, stating: "The obligation of the debtor to make payments under the arrangement continued only during its existence and terminated upon discontinuance of the arrangement proceedings under Section 77." After the arrangement was terminated (not by the debtor) the Court held that his future earnings as pledged by the arrangement could not still be taken over his objection. There was, however, no objection *per se* to the inclusion of future earnings in the original order.

A very simple and applicable definition of the requirements of an arrangement is contained in the case of *In re Kovell Oil Co.* (D.C. Cal. 1940) 31 F. Supp. 319, 46 Am. B. R. (N.S.), 294, where the Court said:

> "A petition which discloses some type of 'arrangement' or 'plan' providing for the settlement, satisfaction, or extension of time of payment of the debtor's obligations on any terms, even though it is not a very definite plan as to terms, is sufficient to give the Court jurisdiction."

We respectfully submit that on pages 519, 520 and 521, Collier on Bankruptcy, 14th Edition, Volume 8, the question of the provisions of arrangement with respect to consideration, and deposit thereunder, is gone into in great detail. We take the liberty of quoting portions therefrom as follows:

> "The first item which Sect. 337 (2) prescribes as part of the required deposit is 'the consideration, if

any, to be distributed to the creditors.' That does not necessarily mean all the consideration which is provided for in the arrangement. It means rather only such part of the consideration, if any, consisting of money and other property *capable of deposit,* which is to be distributed to *unsecured* creditors upon *confirmation* of the arrangement pursuant to the *provisions* of the arrangement.

"Under Sect. 356, the arrangement *must* 'include *provisions* modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.' Hence the *provisions* of the arrangement dealing with the consideration which is to be distributed to creditors must first be examined in ascertaining the 'consideration' which must be deposited pursuant to Sect. 337 (2).

"'Consideration' includes other and usual meanings of the word, such as money, promises to pay money unaccompanied by evidences of indebtedness, promises to render other performances, and promises to refrain from doing certain acts. The 'consideration' which must be deposited pursuant to Sect. 337 (2) does not necessarily mean all the consideration provided for in the arrangement, but is limited to the consideration which is capable of deposit * * *. Thus, if the only consideration provided for in the arrangement consists of a *promise to pay money in the future unaccompanied by evidences of indebtedness* * * * that consideration is not capable of deposit and there is no consideration which can be deposited under Sect. 337 (2). That an arrangement might not provide for any consideration capable of deposit is recognized in Sect. 337 (2), which provides for depositing 'the consideration, *if any,* to be distributed to the creditors,' and in Sect. 367 (3), which provides for the distribution of 'the consideration deposited, *if any,* and in Sect. 370, which similarly provides for the distribution of 'the consideration, *if any,* deposited.'

"The 'consideration' which must be deposited pursuant to Sect. 337 (2) is limited not only to the con-

sideration capable of deposit, but is further limited to such of that consideration which is to be distributed upon confirmation. * * * Under Sect. 367 (3), the consideration deposited must be distributed 'upon confirmation,' and hence consideration which is not to be distributed upon confirmation need not be deposited."

II.

The Court of Appeals decided in its majority opinion that the provisions of Chapter XIII of the Bankruptcy Act were applicable in determining the rights of the debtor in Chapter XI Proceedings. Petitioner believes that there is no basis for such application.

A. Section 301 of Chapter XI of the Bankruptcy Act states:

> "The provisions of this chapter shall apply exclusively to proceedings under this chapter.

Section 601 of Chapter XIII of the Bankruptcy Act states:

> "The provisions of this chapter shall apply exclusively to proceedings under this chapter."

How can we then reconcile application by the Court of Appeals of provisions of Chapter XIII to Chapter XI?

The fact that Section 606 (8) (as amended) of Chapter XIII of the Bankruptcy Act, which was cited by the Court (R. 48) limits Chapter XIII to persons earning less than $5,000.00 per year should have no bearing in this case under Chapter XI wherein the debtor earns more than $5,000.00 per year.

B. Just as Chapter X provides for certain corporate reorganizations without precluding arrangements by corporations under Chapter XI, so Chapter XIII provides for certain wage earner's plans, without precluding all persons who work for wages from qualifying under Chapter XI.

C. Congress contemplated that petitions would be filed under Chapter XI by wage earners. Article X of Chapter XI provides for dismissal and adjudication in Chapter XI proceedings in the event of certain contingencies. In Section 379 under Article X of Chapter XI, the Statute provides:

> "No adjudication shall be entered under this chapter against a wage earner * * * unless such person shall in writing file with the court consent to the adjudication."

It appears to petitioner that Congress, by negative inference, specifically contemplated arrangements by wage earners in Chapter XI proceedings.

III.

The arrangement under Chapter XI may be confirmed notwithstanding a previous discharge in bankruptcy by debtor within six years.

The Court of Appeals also denied relief to this debtor because he was granted a discharge in bankruptcy on April 4, 1947, which was within six years of the date of confirmation of the arrangement under Chapter XI. In support of such finding, the Court set forth certain citations of texts and mis-citations of the Bankruptcy Act.

A. The Court of Appeals states (R. 49):

> "* * * The provisions of Sec. 15c(5) are made applicable to Chapter XI proceedings by Sec. 366 (4)."

We respectfully suggest that the Court of Appeals did not correctly interpret Sec. 366 (4), which requires the debtor to be free of guilt from acts barring discharge. Falsification of books and records, false or inaccurate statements, fraudulent transfer or concealments, failure to explain loss of assets, are considered under this clause. *In re New York Fluorescent Light Co., Inc.*, 1942, 44 F. Supp. 54; 52 A.B.R. (N.S.) (314); *In re Hirsch*, 4 F. Supp. 708; 23 A. B. R. (N. S.) 40; *Matter of Abe Weintraub*, 240 F. 232, 39 A.B.R. 407.

In Remington on Bankruptcy, Vol. 7, page 236, item 3091-9, the author says:

> "It is questionable, however, whether either the confirmation of an arrangement or a discharge in bankruptcy should be considered to render the debtor guilty of an act in the sense that guilt of an act may preclude the confirmation of an arrangement."

In the case of *In re Jaffe* (D. C. N. Y. 1926) 14 F. 2d 558 the Court stated:

> "Where the majority of creditors approve of the terms of a composition, confirmation will not be denied unless it is manifest that the bankrupt has been guilty of acts which transgress the intent and spirit of the Bankruptcy Act."

B. The Court of Appeals also states (R. 49):

> "The confirmation of an arrangement operates as a discharge under a Chapter XI proceeding."

We agree that such may be the case in certain composition arrangements. We urge, however, that such is not the law, particularly so in the instant case.

The debtor states affirmatively that such order of confirmation does not act as a discharge where (1) the order of confirmation specifically provides that there will be no discharge and that the Court will retain jurisdiction until all debts are paid in full, and (2) where the Arrangement confirmed provides for extension only (not composition) and for payment to creditors of 100% of their claims. These provisions are present in the case before this Court.

1. The order of confirmation specifically provides (R. 18):

> "D. That this order of confirmation and any amendment thereto hereafter entered, shall not constitute a discharge of the scheduled liabilities of the Debtor herein until a showing has been made to this

Court that all terms of the plan of arrangement or order of confirmation have been complied with.

"The Court hereby reserves the right to modify, alter, rescind and amend this order in whole or in part, at any time hereafter."

We respectfully refer the Court to Section 371 of Article IX of Chapter XI of the Bankruptcy Act, which provides:

> "The confirmation of an arrangement shall discharge a debtor from all of his unsecured debts and liabilities provided for by the arrangement, *except as provided in the arrangement or the order confirming the arrangement.*" (Italics ours.)

We respectfully represent that the above quoted portion of the order confirming the arrangement brings this case within the exception.

In quoting Section 371, the Court of Appeals neglected (R. 49) to include the exception set forth by Congress, which exception is completely applicable in this case. When Congress sets forth an exception in a law, the exception is also a part of the law, and the omission of pertinent specific exceptions in legislative acts constitutes a complete misstatement of the law.

The primary rule of statutory construction is to give effect to legislative intent. For that purpose courts consider the circumstances and conditions under which legislation is enacted, and the evils or injustices sought to be corrected. If we examine at length the entire paragraph, *i.e.*, the provisions in addition to those stated by the Court in its opinion, the only logical conclusion is that Congress intended that there be no discharge when the order of confirmation so provided. This entire intent of Congress has been completely and absolutely ignored in the majority opinion of the Court of Appeals. It is not in the province of that Court to innovate statutes or to omit portions of statutes so as to

give constructions which are very apparently contrary to the intent of Congress.

2. All of the texts cited by the Court of Appeals (R. 49) refer to confirmation of *composition* arrangements. In none of the citations was there an *extension* for payment in full, as in this case. The Court of Appeals, in its majority opinion, completely ignored the distinction between composition and extension as affecting discharge. We submit that *no discharge was contemplated or ordered* by the order of confirmation in this case. The debtor will pay every creditor in full.

On p. 67, Collier on Bankruptcy, 14th Ed., Vol. 8, defines an arrangement providing for an extension of time for payment of debts in full, as differentiated from an arrangement providing for composition, as follows:

> "If the debtor proposes to make deferred payment in full himself, without more, that is clearly a case of an extension. * * * Section 307 refers to an arrangement 'providing for an extension of time for payment of debts in full.' It would seem that any arrangement under which the debtor himself is to make deferred payments in full to his general unsecured creditors, with or without interest, security, guaranty, or evidence of indebtedness, is an arrangement providing for an extension of time for payment of debts in full."

We submit that the arrangement in this case falls within the category of an *extension* under the above definition.

The question of whether proceedings by way of extension are excluded from the bar provided by Sect. 14, sub. c. (5) has been adjudicated and discussed in great detail in the case of *In re Thompson* (D. C. Va., 1943), 51 F. Supp. 12, which involves a bankruptcy filed within six years after an order of confirmation of an extension. Although in the case at issue we have the order of confirmation of an extension within six years after discharge in bankruptcy, the state-

ments of the Court in the *Thompson* case, despite the variance in the order of filing the proceedings, are completely applicable to the case at bar. In that case the Court discussed at very great length the distinction between compositions and extensions, stating:

> "* * * The strongest argument against the creditor's contention is the very simple one that the statute refers to *compositions* or arrangements by way of *composition* but omits any reference to *extensions.*" (Italics theirs.)

In said case the Court, after checking every feasible source to arrive at the intent of Congress, construed the intent of Congress as not to include in the bar provided by Sect. 14, sub. c. (5) any proceedings solely by way of extension. (*In re Thompson* (D. C. Va., 1943), 51 F. Supp. 12, last two paragraphs on page 14.)

The only logical conclusion after reading the *Thompson* case would be that proceedings solely by way of extension may be filed within six years of previous discharge in bankruptcy. The following statement by the Court in that case is very pertinent herein:

> "It is to be remembered that bar to a second discharge in bankruptcy within six years had a definite and desirable purpose. It was to prevent the creation of a class of habitual bankrupts, to prevent debtors from going through bankruptcy and escaping payment of their debts whenever and as frequently as they chose. The provision was inserted in the law in 1903, when a proceeding solely for extension was unknown and when bankruptcy resulted, and was expected to result, in practically every case with the release of the debtor after satisfaction of a small percentage of his indebtedness. The reasons why a debtor should not be allowed to accomplish this result as frequently as he chooses *have no application to the situation where the debtor offers to and does pay his debts in full.*" (Italics ours.)

3. Federal Courts have for long periods of time administered estates of bankrupts even in those cases where discharge would not be possible. There appears to be no statute prohibiting the referee in bankruptcy from administering the estate of the debtor in a Chapter XI proceeding even if a discharge were not possible. We respectfully submit that the instant case is merely a voluntary submission of his estate by a debtor for administration by the Federal Courts, and that such administration was approved by the majority of creditors under a specific arrangement.

In the case of *Hill* v. *Topeka Morris Plan Co.*, 10 Cir. (1939), 105 F. (2d) 299, a proposal of composition (not extension) was not made until after the referee's recommendation for dismissal, and when finally proposed, the plan obviously on its face could not be carried out. The debtor had been previously discharged in bankruptcy. In that case the Court stated:

> "Jurisdiction to administer estate of petitioner who sought a composition and extension of debts was not affected by a previous discharge within six years."

IV.

Respondent, the only objecting creditor, has no appealable interest in the order of confirmation.

1. This petitioner received no copy of respondent's petition for leave to appeal to the Court of Appeals and the record indicates no such petition nor entry of any order of the Court of Appeals granting such petition.

The amount due Peoples Finance Company, creditor-respondent, is $342.52 (R. 2, last para.). Section 24 of the Bankruptcy Act states in part as follows:

> "* * * Provided further, That when any order, decree or judgment involves less than $500.00, an appeal

therefrom may be taken only upon allowance of the appellate court."

2. Petitioner reiterates that the arrangement in this case provides for payment of 100% to all creditors over a period of time. Over seventy-five per cent of creditors have accepted the arrangement. The respondent herein is the only creditor who has objected to the arrangement. The record indicates that the petitioner herein has adhered to the plan of arrangement and order of confirmation. The Disbursing Agent appointed by the Court is in a position to make distribution of approximately half of scheduled liabilities at the present time, which distribution is withheld only because of the present appeal. No request was made for the Disbursing Agent or Trustee to object to the order appealed from, and no such objection was filed by any officer of the Court. The respondent does not object to the provisions of the order of confirmation so far as they are equitable and fair, but attacks the *jurisdiction* of the Court to enter such order of confirmation. Appellee believes that a single creditor in a reorganization or extension proceeding may attack unfair or discriminatory provisions of an order of confirmation, but that such creditor is not automatically such a party to the arrangement proceedings as to be empowered to attack the *jurisdiction* of the Court to enter the order of confirmation.

The case of *In re Trust No. 2988 of Foreman Trust & Sav. Bank* (C. C. A. 7, 1936), 85 F. 942, concerns reorganization rather than extension proceedings, but the remarks of the Court in that case are relevant to the case at bar. In that case the Court said:

> "An individual creditor is not a party to a reorganization proceeding, except in the limited manner above mentioned, and may be heard on other matters only when permitted to intervene."

And on page 943, the Court stated:

> "The mere filing of objections or exceptions is insufficient to constitute intervention, and such an objector is not a proper party to appeal." (Citing *South Carolina* v. *Wesley,* 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254.)

And, again, on page 943 of the same case, the Court stated under item No. 7:

> "An assignment that the decree was void for want of jurisdiction and without warrant of law does not comply with the requirements of particularity of Rule 10 of this court." (Citing *Smith* v. *Hopkins,* 120 F. 921 (C. C. A. 7); *Northern Central Coal Co.* v. *Barrowman* (C. C. A.), 246 F. 906; *Lahman* v. *Burnes National Bank* (C. C. A.), 20 F. (2d) 897; *Washburn* v. *Douthit* (C. C. A.), 73 F. (2d) 23.)

It would appear, therefore, even though the rules of court have been amended since the above decision, that from an equitable viewpoint an individual creditor should have no right to question on appeal the *jurisdiction* of the lower court to enter an order of confirmation or entertain the Chapter XI arrangement.

In 1936, in a reorganization rather than an extension proceeding, in the case of *In re 211 East Delaware Place Building Corporation,* Case No. 59144, cited at 15 F. Supp. 947, in the Northern District of Illinois, Eastern Division, the District Court stated on page 949:

> "The purpose of the enactment, commonly known as 77B, was to avoid delays in the reorganization of financially embarrassed corporations and to prevent a single creditor from obstructing the prompt and effective administration of estates of debtors who seek the relief which this remedial statute (77B) affords to both debtors and creditors. If a single creditor may obstruct the efforts of over 90% of the creditors of

each class, 77B would be no improvement over the old foreclosure proceedings where small minority creditors could and did create nuisance values by refusing to join in a reorganization. If this same group may accomplish the same thing (delay and obstruction) by appeal, then they, too, may create nuisance values which the statute was intended to prevent. Of course to be accurate it should be said that the malodorous action of creating nuisance value is not the work of the creditor alone. It is more frequently the attorney not the creditor whose conduct is reprehensible.

"Congress was not unacquainted with the maneuvers and manipulations of those who are skilled in the art of creating and developing nuisance values. It rightly looked upon them as leeches worse than usurers. At least they are lustier and more persistent in asserting imaginary rights and noticeably less modest when stating the price at which they will forego their right to appeal or waive their right to insist upon the full period of redemption. Courts of equity have always had to deal with them. But with the enactment of 77B they have swarmed the courts like locusts. No extravagance of language is indulged when I say they are as welcome in our midst as the measles, and, if either Congress or the courts are ever able to drive them hence, their departure will be unmourned."

In connection with the applicability of the above citation to this case, appellee respectfully refers this Court to page 11, the first paragraph of page 12 and the first paragraph of page 13 of the record of proceedings herein.

CONCLUSION.

Referee MacChesney, Judge Barnes of the District Court, and Judge Lindley of the United States Court of Appeals in his dissenting opinion, found valid the order of confirmation entered in the Chapter XI proceedings.

The majority of the judges of the Court of Appeals disregarded these opinions and entered an order of reversal. In so doing, the majority of the Court modified the unambiguous language of Chapter XI of the Bankruptcy Act and nullified the manifest intent of Congress.

It is respectfully submitted that this Court should exercise its discretionary power and issue the Writ of Certiorari a prayed in the petition, or that in the alternative, the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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FILED
MAR 20 1953
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 633

In the matter of

OLE A. JENSEN,

Debtor.

OLE A. JENSEN,

Petitioner,

vs.

PEOPLES FINANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This suit arose by debtor's petition in the bankruptcy division of the United States District Court for the Northern District of Illinois, Eastern Division.

STATEMENT OF FACTS.

It is important to note that on

October 30, 1950: Original Petition in Proceedings under Chap. XIII filed (R. 3).

March 13, 1951: Petitioner held not eligible for Chap. XIII. Case transferred to Chap. XI by court, on its own motion (R. 24).

June 28, 1951: Plan for Arrangement under Chap. XI confirmed (R. 16).

The confirmed Plan for Arrangement (R. 16) is the *identical* Wage Earners' Plan (R. 3) which had been denied by the Referee (R. 24).

Confirmation of the Wage Earners' Plan, filed as a Chapter XI Arrangement, was reversed by the Court of Appeals, 7th Circuit, by a majority opinion (R. 45). There was a dissent *in part* (R. 49).

At bottom of page 3 of debtor's petition writ of certiorari to the United States Court of Appeals for the Seventh Circuit, this Court is asked to decide two contentions of the objecting creditor, on which a majority in the Court of Appeals were in agreement (R. 48):

1. that a bankruptcy court has no authority to create an estate solely out of future earnings of the debtor, confirming same under a Chapter XI arrangement.

The ordinary meaning of "estate" includes *property* in general. That *property* is to be administered under Chapter XI is clearly indicated by the wording of the Act, *viz.:*

Sec. 312 (2) * * * lease or sell property * * *

Sec. 314 * * * liens upon the property * * *

Sec. 342 * * * debtor * * * continue in possession of his property * * *

Sec. 343 * * * Manage property of the debtor * * *

Sec. 352 * * * the property of the debtor

FUTURE EARNINGS are not, in contemplation of the Bankruptcy Act, property. They are not con-

verted into property under an arrangement pledging a portion of future earnings.

Local Loan v. *Hunt,* 292 U. S. 234, 243.
McKeever v. *Local Fin. Co.,* 80 F. 2d 449, 452, 5th Cir.
Wood v. *Scott,* 180 F. 2d 252, 253, 6th Cir.
Seaboard Loan Co. v. *Ottinger,* 50 F. 2d 856, 859, 4th Cir.

On this point there is no conflict among the various courts of appeals, and this Court has definitely sustained the proposition in *Local Loan* v. *Hunt, supra.*

The dissent finds "no requirement in any provision of the chapter that the debtor must have *property* in esse. This is an attempt to interpret that which is not in the chapter, directly nor by implication. Contrary-wise, there is no proposition for the submission of *property* which may be *non esse.*

The debtor testified that he had no property and no business which he could "turn over to a receiver" (R. 7).

2. that the previous discharge of debtor in a voluntary bankruptcy proceeding within six years of filing of his petition in the District Court is a bar to the Chapter XI proceedings (R. 45-49).

THE BANKRUPTCY ACT does not permit one who cannot get a discharge in bankruptcy to secure its equivalent through a composition or extension.

Hill v. *Topeka Morris Plan Co.,* 10th Cir. (1939) 105 F. 2d 299, 300. (Cert. denied 308 U. S. 595).
Re Greenman (D. C. Me.) 10 F. Supp. 452, 453.
6 Amer. Juris. 1950 Ed. Par. 1313 p. 1319.
8 Collier on Bankruptcy 14th Ed. Sec. 9.19 (1941).
8 Collier on Bankruptcy 14th Ed. Sec. 9.32 (1941).
28 Am. B. R. (N.S.) 61-63.

The dissent, relying upon *In re Thompson,* 51 F. Supp. 12, maintains that, if the *present* arrangement be solely by way of extension, proposing to pay debts in full, it can suffer no bar. The decision holds precisely the reverse, *i.e.*

> "* * * it was the purpose of Congress not to include in the bar * * * *previous* proceedings had solely by way of extension, where the *then* existing debts had been *paid in full.*" (Italics ours).

Logically, there must be a *previous* proceeding to establish a bar. The type of the instant or subsequent proceeding is not controlling with reference to the bar to a discharge.

The previous proceeding to the instant suit was a voluntary *bankruptcy,* in which the debts *had not* been paid in full. As a consequence, such prior discharge within six years, April 4, 1947 (R. 22), was a bar to the second discharge (mandatory under Sec. 371 of the Act), June 28, 1952 (R. 15-18), upon confirmation of the Chapter XI proceedings.

ANSWER OF RESPONDENT TO QUESTIONS OF LAW PRESENTED BY PETITIONER.

1. Whether the application of future wages to a liquidation of debts may be proposed as the basis of an arrangement under Chapter XI of the Bankruptcy Act.

Answered, *supra,* under FUTURE EARNINGS.

2. Whether the statutory limitation that wage earners may take advantage of Chapter XIII * * * only if they earn less than $5,000. per year, forecloses all persons who earn in excess of $5,000. per year as wages or salaries from qualifying under Chapter XI * * *

Answer: Sec. 601 provides that the *provisions* of Chapter XIII shall *apply exclusively* to *proceedings* under that Chapter.

9 Collier 14th Ed. (1941) Sec. 21.01 p. 532.
8 Collier 14th Ed. (1941) Sec. 1.01 p. 3.

The provisions of Chapter XI, by the terms of the statute, are limited to proceedings brought under that chapter.

7 Remington 5th Ed. (1939) Sec. 3054/7-3129.2.

Section 606 (8) plainly defines a wage earner. Under Chapter XIII persons earning in excess of $5,000. per year, as wages of salary, are not *wage earners.* Under Section 1 (32) of the Bankruptcy Act, earnings may not exceed $1500.00 per year, as wages, salary or hire, to qualify as a *wage earner.*

3. Whether previous discharge in bankruptcy within six years bars debtor from obtaining in Chapter XI proceedings confirmation of an extension agreement providing for payment of his debts in full.

Answered, *supra,* under THE BANKRUPTCY ACT • • •

4. Whether a sole dissenting creditor may on appeal question the jurisdiction of the lower court to enter an order confirming an arrangement under Chapter XI • • •

Answer: This question was not passed upon by the Court of Appeals, and hence would not be decided by this Court.

U. S. v. *Fleischman,* 339 U. S. 349, 70 S. Ct. 739 (11).

The certificate of the Referee waived this question. (R. 28-4).

ANSWER OF RESPONDENT TO PETITIONER'S SPECIFICATIONS OF ERROR.

Petitioner states: The Court below erred in its majority opinion:

1. In applying to the facts herein mere *dicta* from cases wherein the factual situations were completely dissimilar, and in disregarding unambiguous language of the Bankruptcy Act in arriving at its decision in this case.

Answer: No cases being submitted, it is impossible to understand wherein error exists.

2. In completely disregarding and even omitting from its opinion the pertinent specific exception set forth by Congress in Section 371 * * * and thus nullifying the intent of Congress.

Answer: The exception in Section 371 pertains to

A—Debts not provided for in the arrangement;

B—Debts not dischargeable under Section 17;

C—Debts which the arrangement provides are not to to be discharged;

D—Debts which the arrangement order excepts from the discharge.

8 Collier 13th Ed. (1941) Sec. 9.32 p. 1258.

It is the *debts* which may be excepted. But the question of a *discharge* does not come within the exception.

> "In Chapter XI Congress made certain that no doubt exist * * * whether the confirmation of an arrangement operates as a discharge. Section 371 specifically provides that confirmation shall have such effect".
>
> 8 Collier 14th Ed. (1941) Sec. 9.32 pp. 1261, 1262 and 1266.

The District Court applied Section 660 of Chapter XIII in its Order confirming the Chapter XI proceeding, in order to avoid the mandatory provision for discharge in Section 371. This was one of the reasons for reversal by the Court of Appeals (R. 49). To say that Section 371 *discharges,* "except" that it does not *discharge,* is a violation of all logic and reason.

Experience with former proceedings in bankruptcy prompted Congress to insure a discharge to debtors who surrendered their property under Chapter XI proceedings. Previously, no discharge was granted upon confirmation. When the surrendered property did not stretch sufficiently, the debtor frequently found himself confronted with unpaid debts.

3. In deciding, contrary to the intent of Congress specifically set forth in the statute, that various sections of Chapter XIII proceedings shall apply to Chapter XI proceedings.

Answer: The Court of Appeals decided precisely the contrary, *i.e.,* that, generally, the provisions of Chapter XIII *do not* apply to Chapter XI; and, specifically, that Section 606 (8) of Chapter XIII has no application to Chapter XI; nor can Section 660 of Chapter XIII be applied to a Chapter XI proceeding. The Court of Appeals said:

> "• • • the decision of the referee, affirmed by the district court, that debtor herein was entitled to liquidate his liabilities under a plan contemplated by the provisions of Chapter XIII, irrespective of the excess of his earnings over the limitation imposed by that Chapter, by the mere device of filing such a plan under Chapter XI, would entirely nullify the limitation which Congress imposed in Sec. 606 (8) of the Bankruptcy Act." (R. 48)

4. In disregarding the distinction between composition and extensions, in considering arrangements under Chapter XI.

5. In permitting one sole dissenting creditor to attack, on appeal, the jurisdiction of the Court to order confirmation of an arrangement under Chapter XI of the Bankruptcy Act.

Answer: The questions arising under the last two specifications of error were not passed upon by the Court of Appeals, and hence would not be decided by this Court.

U. S. v. *Fleischman,* 339 U. S. 349, 70 S. Ct. 739 (11).

ANSWER OF RESPONDENT TO PETITIONER'S REASONS FOR ISSUANCE OF WRIT.

1. There is no express provision in Chapter XI permitting thereunder a Chapter XIII proceeding, as attempted in this suit.

2. The type of person involved in this litigation is a Wage Earner. Such type is clearly defined by the Act under Sec. 1 (32) and Sec. 606 (8).

3. As to the type of arrangement which may be proposed under Chapter XI, there is nothing in the chapter, nor in decisions, to indicate even remotely that a Wage Earners' Plan may be maintained under Chapter XI. Sections 601 and 606 (8) specifically confine a Wage Earners' Plan to the provisions of Chapter XIII.

4. No clarification is required as to the effect of a previous discharge in bankruptcy upon arrangements; first, because the authorities are in accord on the subject, and, secondly, in *Hill* v. *Topeka Morris Plan Co.,* 10th Cir. (1939) 105 F. 2d 299 at 300, (Cert. denied 308 U. S. 595),

it was held: "* * * the bankruptcy act does not permit one who cannot set a discharge in bankruptcy to secure its equivalent through a composition or extension".

5. This question was not passed upon by the Court of Appeals, and may not be decided by this Court.

U. S. v. *Fleischman,* 399 U. S. 349, 70 S. Ct. 739 (11).

ANSWER OF RESPONDENT TO PETITIONER'S CONCLUSION.

The abstraction of an "economic depression" would result in reduced earnings for most all wage earners. Thus, the gate (Sec. 606-8) into Chapter XIII would be widened.

ARGUMENT.

I.

A. Section 306 of the Bankruptcy Act states: For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean by any plan of a debtor * * *" "* * * the purposes of this chapter" are to provide an "arrangement". In the instant suit, a wage earners' PLAN was provided; not an "arrangement".

The Wage Earners' PLAN submitted by the debtor under Section 306 was inconsistent with the context of the chapter, which calls for the "setting in order" of the debtor's *property,* as distinguished from the acquisition of his *wages.*

B. The statute, nor any decision on the point, does not indicate that the property submitted by the debtor under Chapter XI may be *non esse.* Future wages, being non-existent and highly speculative, cannot be the subject of "an inventory and appraisal of the property of the debtor", required by Section 333 of the Act. Chapter XI is replete with the necessity of having property *in esse* to be placed in the hands of a receiver, or continued in the possession of the debtor.

Following the Statement of Facts, in this brief, will be found a list of decisions on the question of FUTURE EARNINGS in relation to *property* under applicable federal decisions pertaining to bankruptcy.

II.

The Court of Appeals properly decided that the *provisions* of Chapter XIII (especially Sec. 606-8) apply *exclusively* to proceedings under that chapter, holding, "the mere device of filing such a plan under Chapter XI, would entirely nullify the limitation which Congress imposed in Sec. 606 (8) of the Bankruptcy Act" (R. 48, 3d par.).

CONCLUSION.

The majority opinion by the Court of Appeals indicates a thorough examination of the record in this suit. The court studiously digested all of the decided cases submitted by both sides, and numerous opinions of commentators in bankruptcy, pertinent to the issues involved.

The Court of Appeals has correctly held that:

> The application of future wages to the liquidation of debts contemplated under Chapter XIII, may not be allowed as the basis of an Arrangement under Chap. XI;
>
> The confirmation of the Arrangement herein operated as a discharge, which relief cannot be granted, because the debtor was granted a discharge in voluntary bankruptcy within 6 years of the confirmation of the plan under Chapter XI;
>
> A discharge under Chapter XI, being mandatory under Section 371 of the Act, may not be deferred by utilizing Section 660 of Chapter XIII.

The petition for a writ of certiorari should be denied.

Because this litigation has pended since March 13, 1951, marked by incessant delays and motions on the part of the petitioner (shown in R. 26, 55 and 57), the respondent

respectfully urges that the petition and answer herein be considered, and a decision rendered, promptly.

Respectfully submitted,

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